

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

27761

FILE: B-212925

DATE: March 23, 1984

MATTER OF: United States Army Materiel Development
and Readiness Command--Request for
Advance Decision; Hitachi Denshi
DIGEST: America, Ltd.

1. Agency decision, after bid opening, to conduct independent tests to determine if equipment meets core requirements of solicitation rather than accept bidder's self-certification in bid is proper to determine actual compliance with core requirements in view of agency doubts raised by protest.
2. Where solicitation required that option prices not contain nonrecurring or startup costs, fact that bidder bid the same price for basic and option quantities does not show violation of requirement because bidders were not required to submit cost breakdown and inflation during 5-year contract could account for higher option price.

The United States Army Materiel Development and Readiness Command (Army) requests our advance decision on a protest filed by Hitachi Denshi America, Ltd. (Hitachi), under invitation for bids (IFB) No. DAAR07-83-B-H003, issued by the United States Army Communications-Electronics Command (CECOM), Fort Monmouth, New Jersey. Hitachi protests the proposed award to Tektronix, Incorporated (Tektronix), the low bidder under the IFB, which is the second step in a two-step formally advertised procurement for the multiyear acquisition of 8,000 AN/USM 488()100 MHz oscilloscopes, plus associated data and services.

Specifically, the Army requests our decision as to whether it may conduct further independent testing on the Tektronix model 2215 60 MHz oscilloscopes to determine if that model meets the core requirements of the solicitation. For the reasons stated below, we believe that the Army may conduct the independent tests.

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BACKGROUND

On November 9, 1982, CECOM issued a letter request for bid sample (LRFBS), No. DAAB07-83-B-H003, as the first step in this procurement. The LRFBS required offerors to submit two modified commercial bid samples along with specifically required documentation. Eight firms submitted a total of nine different oscilloscopes in response to the LRFBS. All offerors were requested to clarify the documentation submitted with the bid samples. After receipt of the clarifications, the Army rejected two bid samples and proceeded to conduct electrical performance testing on the remaining seven models. One bid sample was rejected after the testing, and the remaining six units were determined to be susceptible of being made acceptable and the offerors allowed to enter the second step of the solicitation. The IFB for the second step was issued on July 29, 1983, and bids were opened on August 29, 1983. Tektronix was the low bidder; Hitachi was the second low bidder.

On September 1, 1983, Hitachi filed a protest with our Office contending that Tektronix failed to meet the commerciality requirements of the LRFBS and, therefore, was ineligible to compete in the second step of the procurement.

COMMERCIALITY REQUIREMENTS

The solicitation permitted an offeror with a standard commercial product that satisfied some, but not all, of the Army's requirements to modify that product to meet the specifications. However, the standard commercial product to be modified was required to meet two prerequisites: (1) it must be a "commercial item" as defined in terms of the sales and delivery criteria contained in the solicitation and (2) it must meet 32 "core requirements" without modification. Each offeror was required to provide a self-certification that its standard commercial model met those prerequisites. The Army conducted no tests on the standard commercial models; it tested only those models submitted as bid samples.

Tektronix certified that its model 2215 met the commerciality requirements; its model 2235, an upgraded version of the model 2215, was provided as a bid sample.

Hitachi contends that although the model 2215 meets the required sales and delivery criteria, that model does not comply with all of the core requirements. In support of its protest, Hitachi submitted a report of tests conducted by an independent testing laboratory which concluded that the model 2215 did not comply with four of the core requirements (requirements relating to bandwidth, rise time, triggering modes, and trigger coupling).

As a result of that report and after discussions with Tektronix personnel at a bid protest conference held at our Office on November 16, 1983 (at which Tektronix officials claimed that, with adjustments, the model 2215 would meet the core requirements), the Army determined that it would independently test the Tektronix model to determine if it met all core requirements. The Army communicated its position to Tektronix in a letter dated November 23, 1983. In relevant part, the letter stated:

"... Testing will be based on written instructions from your company in regards to the necessary adjustments to be made to the Model 2215. The test unit will be independently selected by Government representatives. The Government, at that time will decide whether the testing will be done in house or at an independent testing facility. If the testing is done in house by the Government, the tests will be conducted by cognizant electrical engineers. No bidders representatives will be allowed to witness the testing. The results of the Government testing will be final."

After receiving the Army's letter, Tektronix conducted tests on selected model 2215's to prove that the model 2215 could meet all core requirements when the proper adjustments were made. In support of its claim, Tektronix submitted affidavits from two individuals who conducted the tests and from an engineer who witnessed one of the tests. Tektronix further offered to demonstrate the model 2215's compliance with core requirements for Army personnel. Tektronix objected to the Army's proposal to test the oscilloscopes independently, however, claiming the Army engineers' unfamiliarity with the equipment might adversely affect the test results.

The contracting officer believes that the information provided by Tektronix is inconclusive for the purpose of determining Tektronix's eligibility for award because the units selected for testing by Tektronix were not chosen by a disinterested party, adjustments were made to the chosen units by Tektronix personnel, and the nature of those adjustments were unknown. The contracting officer believes that the information provided was not sufficient to refute the evidence to the contrary placed in the record by Hitachi and that the only way to resolve the impasse fairly is to conduct independent tests of the equipment.

Because Tektronix objected to the independent testing, the Army seeks our advance decision as to whether it can conduct the independent testing as it proposed or, alternatively, whether the facts in the record require award to Tektronix.

Tektronix contends that there is sufficient evidence in the record from which the Army can determine that the model 2215 meets the core requirements and urges our Office to direct the Army to award the contract to Tektronix on the basis of that evidence. Tektronix contends the Army is now attempting to add a requirement that was not contained in step one of the procurement and that only Tektronix must meet this new requirement.

In previous protests where technical disputes have arisen, we have consistently taken the position that it is not the function of this Office to resolve technical disputes of this nature. See 54 Comp. Gen. 612, 644 (1975). The evaluation of technical proposals is a matter within the discretion of the contracting agency since it is in the best position to define its needs and the best method for accommodating them. Health Management Systems, B-200775, April 3, 1981, 81-1 CPD 255. In reviewing an agency's technical evaluation, we will only examine the agency's evaluation to ensure that it had a reasonable basis. Auto Paint Specialist, Inc., dba K & K Truck Painting, B-205513, June 21, 1982, 82-1 CPD 609.

Considering the conflicting evidence in the record, we believe the Army is acting reasonably in requiring the testing before determining that the model 2215 meets the core requirements of the solicitation.

Regarding Tektronix's argument that this is a new requirement, not contained in step one, we disagree. The 32 core requirements have remained the same. What the Army proposes to do is to substitute testing to show compliance with the requirements for the self-certification which Tektronix has already made. No new performance requirements are being introduced.

However, we do agree with Tektronix that it is the only firm being subjected to the testing in lieu of the self-certification. So that all competitors will be treated equally, if Tektronix's bid is rejected because Tektronix is unable to demonstrate that its model 2215 meets the core requirements, the Army should require any other bidder in line for award to have its oscilloscope undergo the same test rather than accept the self-certification.

Based on the above, we have no objection to the agency's proposal to test the equipment before proceeding with award.

ADDITIONAL GROUNDS FOR PROTEST

Hitachi raised another issue regarding Tektronix's responsiveness in a supplement to its initial protest. Although the Army did not request an advance decision on this issue, because this is the only issue that will remain after the agency conducts the tests discussed above, we will address that issue now in the interest of expediting the resolution of this protest.

Hitachi alleges that Tektronix's bid is nonresponsive because the same price is quoted for the basic units as for the option quantities. Hitachi contends that the option price therefore contains nonrecurring costs, in violation of the terms of the solicitation.

The solicitation, by the following clause, prohibited offerors from including in the price for option quantities any costs of a startup or nonrecurring nature:

"The bidder/offeror may indicate in the space provided below, the unit price(s) for the increased quantities. The bidder/offeror agrees

not to include the price for option quantities any cost of a startup or non-recurring nature, as well as costs for Data Items, which costs have been fully provided for in the unit price(s) set forth in Section B for the item(s) specified in Paragraph 'a' hereof, and further agrees that the price(s) offered for option quantities will reflect only those recurring costs, and a reasonable profit thereon, which are necessary to furnish the additional option quantities."

In addition, the solicitation provided that if an offeror entered no price for the option quantity, the price stated for the basic quantity would apply.

Tektronix bid \$893 per unit for the basic quantity and "NSP" (No Separate Price) for the basic data items and manual. Tektronix did not insert a price for the option quantities and, therefore, the Army used the \$893 basic quantity price in evaluating Tektronix's bid for the option quantity.

Hitachi contends that, since the option price is the same as the basic quantity price, which included the cost of data items and manuals, the option quantity price must contain nonrecurring costs in violation of the solicitation terms.

Initially, Tektronix argues that this ground of protest is untimely because Hitachi is actually challenging the terms of the solicitation and, therefore, the protest should have been filed prior to bid opening of the second step under our Bid Protest Procedures. 4 C.F.R. § 21.2(b)(1) (1983).

We do not find the protest untimely. Hitachi is not objecting to the clauses in the solicitation, but only as to the manner in which Tektronix structured its bid with the "NSP" for the data items. Since Hitachi could not have known this fact until bid opening, the protest is timely.

However, we deny this ground of protest on the merits. The solicitation did not require a bidder to furnish a breakdown of its prices. In fact, under the solicitation, a bidder's option prices could actually be higher than the

basic quantity price and be acceptable. Due to inflation and the length of time of the contract (option quantity is valid for 1,340 days and final deliveries in 5 years), this is possible and, therefore, the fact that Tektronix bid the same price for both quantities does not require the conclusion that nonrecurring costs were included in the option price.

for *Milton J. Doerlan*
Comptroller General
of the United States